

FACTUAL HISTORY

On April 11, 1986 appellant, then a 47-year-old plastic molder, filed a traumatic injury claim alleging on that date he injured his left knee falling in the performance of duty. Appellant underwent an arthroscopy with trimming of the posterior aspect of the medial meniscus and joint debridement on June 27, 1986. The Office accepted appellant's claim for left knee strain on May 20, 1987. On December 10, 1987 the Office granted appellant a schedule award for a 33 percent impairment of his left lower extremity.

Appellant filed an additional traumatic injury claim on March 20, 1989 alleging that on March 10, 1989 he fell, injuring his left knee while working light duty as a timekeeper. The Office accepted appellant's claim for left knee strain on April 25, 1989 and later expanded this claim to include aggravation of bilateral knee traumatic arthritis.

Appellant returned to light-duty work as a clerk on February 31, 1990. On January 22, 1991 appellant accepted a light-duty position as a communications clerk. The Office adjusted his compensation benefits to reflect his actual earnings as a communications clerk on April 2, 1991. On Office form reports, appellant indicated that he worked as a timekeeper in 1993. By decision dated July 5, 1994, the Office found that appellant's actual earnings represented his wage-earning capacity. In Office form reports dated 1994 and 1995, appellant listed his occupation as a payroll technician. Appellant stopped work on April 1, 1996 due to closure of the employing establishment.

The Office granted appellant schedule awards on May 12, 1995, February 14, 1997 and August 11 and 19, 1999. He received schedule awards totaling 65 percent impairment of each of his lower extremities.

In a letter dated October 18, 2000, the Office informed appellant that he had received a formal loss of wage-earning capacity determination on July 5, 1994 and provided him with information concerning the grounds for modifying such a formal decision.

By decisions dated May 16 and August 7, 2001, the Office denied appellant's claim for additional permanent impairment of his lower extremities. Appellant requested an oral hearing on September 6, 2001. By decision dated April 23, 2002, the hearing representative found that appellant's hearing request of the May 16, 2001 decision was untimely and affirmed the Office's August 7, 2001 decision denying appellant's request for an additional schedule award.¹

On December 16, 2003 appellant submitted a document entitled "Request for Reconsideration," contending that he met his burden of proof to modify the July 5, 1994 wage-earning capacity determination. Appellant alleged that at the time the Office issued this decision he was no longer working in the position of communications clerk, but was instead a civilian pay technician. He argued that the Office failed to determine whether he actually held the offered

¹ As this decision was issued more than one year prior to appellant's appeal to the Board on March 2, 2005, the Board does not have jurisdiction to consider this matter. 20 C.F.R. § 501.3(d)(2).

position on the date of its decision, failed to determine if the position was still available on the date of the decision or to determine whether he had been vocationally rehabilitated so as to increase his wage-earning capacity. Appellant also alleged that his condition had materially worsened since the 1994 wage-earning capacity determination.

Appellant submitted a letter of appreciation from the employing establishment dated February 20, 1991, thanking him for his contribution to the timekeeping operations. He also submitted a copy of the communications clerk job offer, a letter from the employing establishment noting that appellant accepted the communications clerk position effective January 13, 1991 and copies of notifications of personnel actions indicating that appellant worked as civilian pay technician effective April 5, 1992 and January 10, 1993. He resubmitted medical evidence already of record.

By decision dated March 3, 2004, the Office denied reconsideration finding that his request was not timely and did not establish clear evidence of error. The Office found that the fact that appellant was not working as a communications clerk at the time of the wage-earning capacity determination did not establish that the position was makeshift as alleged. The Office also noted that appellant alleged that his condition had worsened.

LEGAL PRECEDENT

It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination. Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.²

ANALYSIS

The Office considered appellant's December 16, 2003 correspondence an untimely request for reconsideration based and found that he did not establish clear evidence of error. However, the Board finds that appellant's contention that the July 5, 1994 wage-earning capacity decision was in error, as it was not based on his actual earnings at the time the decision was issued and that he had experienced a material change in the nature and extent of his condition, represents a request for modification of the Office's July 5, 1994 wage-earning capacity determination. As this request for modification is a request for additional compensation, the Office improperly characterized appellant's December 16, 2003 correspondence as an untimely request for reconsideration.³

² Gary L. Moreland, 54 ECAB ____ (Docket No. 03-1063, issued June 20, 2003).

³ *Id.*

CONCLUSION

The Board finds that appellant requested modification of the July 5, 1994 loss of wage-earning capacity determination and is entitled to a merit decision on that issue. The case will be remanded for the Office to address the merits of appellant's request for modification. On remand, the Office should develop the record as necessary and issue an appropriate decision with regard to appellant's requested modification of the wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: July 26, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board